IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8060 OF 2007

Smt.Hirabai Pandurang Patil
since deceased through legal
heirs and representatives ;-
Shri Jaywant Pandurang Patil
and anr. ...Petitioners
Versus
1.Anandrao Laxman Jadhav
Deceased by heirs :-
Suresh Anandrao Jadhav and Ors. ..Respondents

WRIT PETITION NO. 8375 OF 2007

Shri Ananda Shripati Sutar
D/H deceased through legal
Shri Anusaya Anandarao Sutar
...Petitioners
Versus
1.Anandrao Laxman Jadhav
Deceased by heirs :-
Suresh Anandrao Jadhav and Ors. ..Respondents

N.J.Patil for the petitioners.
Amit Borkar for repondent no.2.
Ms.P.S.Cardozo, AGP for respondent/state.

CORAM: S.C.DHARMADHIKARI, J.

30th November, 2007

P.C. :

1. Rule. Respondents waive service. By consent

heard forthwith. I had directed the Appellate Authority to personally remain present in court as this is the third occasion on which its orders are under challenge. However, I was informed that Ms.Valsa Nair Singh, Administrator and Divisional Commissioner, Konkan Division, Mumbai (Appellate Authority) has proceeded on long leave abroad and is unavailable. Hence, the matter is decided after perusal of Records and after the Learned AGP states that he does not wish to file any affidavit-in-reply.

2. In these petitions under Article 227 of the Constitution of India the impugned order is passed by the Divisional Commissioner, Konkan Division, Mumbai dismissing the Appeals which have been preferred by the petitioners challenging the orders of the Competent Authority under the Maharashtra Slum Area (Improvement, Clearance & Redevelopment) Act, 1971 (Slum Act for short) granting permission to the respondents to execute and enforce a Decree passed for possession of an immovable property. The orders of the Competent Authority have been passed as early as on 17.6.1991. Earlier, an Appeal was preferred against the said order

by the present petitioners before the Divisional Commissioner, Pune Division which was decided on 30.11.2005 against which a Writ Petition was preferred in this court being Writ Petition No. 9336 of 2005. On 23.1.2006 that Writ petition was allowed. The order of the Divisional Commissioner was set aside and the matter was remanded for fresh consideration. It is not as if this court was dealing with the matter for the first time. The matter was placed before the Divisional Commissioner, Pune pursuant to the orders and directions of this court in earlier Writ Petition No. 4725 of 2005 and 4738 of 2005. There were specific directions as to how the Appeals have to be disposed off. The earlier orders of the Appellate Authority were set aside by this court in the above writ petitions on 29.4.2005. They were directed to hear the Appeals on merits. However, the Appellate authority despite this court’s order directing it to hear the matter afresh and in accordance with law, chose not to refer to any materials produced by parties in support of their contentions, based its conclusions by conveniently reproducing all observations in the earlier orders which were set aside by this court.

4. In the order dated 23.1.2006 in Writ Petition No.9336 of 2005, which was the second round, this court, therefore, had the following to observe :-

> "5. In the present case, it may be true that the matter has a chequered history and the respondents referred to above have been unable to execute a decree passed in their favour in a suit instituted prior to the Slum Act being promulgated. It is equally true that they are not in a position to enjoy the fruits of the decree passed in their favour. However, from a reading of the order impugned in this petition, it appears to me that the Divisional Commissioner, Pune Division has not bothered to adhere to the directions issued by this Court in Writ Petition Nos.4725 of 2005 and 4738 of 2005 which are between same parties. This court in its order observed thus :-
>
> > "3. The petitions are directed against the order passed by the learned Divisional Commissioner, Pune Division, Pune under Section 35 of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act of 1971; hereinafter referred to as the Act. The petitioners have suffered a decree of civil court, which is sought to be executed by the respondents. The respondents applied for permission to do so under section 22 of the Act. This permission was granted by the Municipal Commissioner, Kolhapur on 17th June, 1991 as per Exh.A to W.P. Nos.4725 and 4738 of 2005 and on 4th June, 1991 as per Exh.'A' to W.P.No.4738 of 2005. Against these

> orders the petitioners have filed respective appeals, which appear to have been delayed by about 33 days.
>
> 4.Having heard the learned counsel for the petitioners, I am of the view that there is sufficient cause for condoning the delay in filing the respective appeals and the delay is hereby condoned.
>
> 5. The learned Divisional Commissioner, Pune is directed to decide the matters on merit as expeditiously as possible and in any case not later than two months from the date the parties appear before him...."

6. The order under challenge before this court in the aforesaid petitions was passed on 29th April, 2005. The order refused to condone delay in filing appeals which were filed by the petitioners herein. At the same time, the appellate authority made observations on merits of the matter. This court set aside these orders, condoned the delay and directed that the appeal be heard on merits. In the orders which were set aside, the observations on merits reads thus :-

> ".....The merits of the case were examined twice by the learned lower court, once on the original application and secondly on remand. Both the parties were given ample opportunity to adduce evidence and make arguments on both the occasions. The learned lower court, on both the occasions, has recorded a finding that the application moved by the present respondents for executing the decree of the civil court was tenable. Advocate Joshi has not been able to offer any strong and compelling grounds for interfering with the

finding of the lower court on merits. As observed earlier, this litigation has a long and chequered history, starting from the civil suit filed by the present Respondents in the yea 1968. Had the decree granted by the civil court been executed before declaration of the suit property as a 'slum' under the provisions of the Slum Act, there would have been no reason or rationale for the present round of litigation under the Slum Act. However, the present Respondents Nos.2 and 3 started the execution proceedings in the year 1979 by which time, the suit property was declared as a 'slum'. For this reason they were required to obtain a permission from the competent authority under the provisions of the Slum Act. The Appellants have failed to make out a case for refusing permission for execution of the decree of the Civil court and hence the lower court has rightly upheld the application. It is also pertinent to note that the order of the Civil Court (in the year 1968) for eviction and possession was not challenged in appeal by the present Appellants. The kept silent till the year 1979 when the present Respondents initiated darkhast proceedings. On merits, therefore, I do not see any reason to interfere with the impugned order."

7. Upon remand, the Divisional Commissioner, Pune by the order which is under challenge in the present petition and passed on 30th November, 2005 in paragraph 4.1, has, made same observations which have been reproduced above by me.

8. It is unfortunate that the appellate authority despite this Court directing it to decide the matter afresh and in accordance

with law, chooses not to refer to any materials produced by parties in support of their respective contentions but rests its conclusion by conveniently reproducing the very same observations which were subject matter of challenge and form part of the earlier order dated 29th April 2005. It is pertinent to note that the Divisional Commissioner, Pune, high powered as he is, is chosen as an appellate authority. The Legislature expected it to scrutinise the matter as an Appellate authority, independently and impartially. The is scrutiny should be consistent with the object of enacting the Slum Act providing therein requirement of permission to execute the decree for possession in respect of premises in Slum Area. It is not as if Section 22 achieves no purpose. The Legislature has provided for permission so that persons residing in Slum areas are not thrown on the streets. While granting permission, Section 22 obliges the Competent Authority to take into account the factors enumerated therein. The order of the Competent Authority has not been given finality advisedly. It is made subject matter of further scrutiny in appeal at the hands of a high powered official designated as Appellate Authority. IN Patesinghrao Anandrao Naik and Others vs. R.V.Deshmukh, Joint Director and Joint Registrar, Co-op.Societies and others, reported in 1981-Mh.L.J.936 in the context of remedy of an appeal, a Division Bench of this court had to observe thus :-

> 25. As observed in Pandit Bhullan’s case an appeal is a creation of statute. Further there is a vast difference between the revisional powers and the appellate powers. An appeal, as stated by Lord Davery in Pannamma vs. Arumoosa is a proceeding in which a question is whether the order of the Court from which the appeal is brought was right on the

materials which the Court had before it. In Legal Parlance appeal means judicial examination of the decision by the higher court of an inferior Court, It amounts to, in essence and pith, a complaint to higher forum that the decision of the subordinate tribunal is erroneous and therefore liable to be rectified or set aside. From this it would follow that an appellate court has power to go not only into the question of law, but also into questions of fact. Such a power would further enable the appellate court to review or reassess the entire evidence an come to its own conclusion. Litigant is entitled to a full, fair and independent consideration of evidence and the material at the appellate stage. Under section 152 of the Act, right of appeal is provided in very wide and general terms. The appellate authority has to decide the appeal as a quasi-judicial authority. To say the least the appellate authority cannot act mechanically as a mere rubber stamp. In the present case in memorandum of appeal various substantial questions of fact were raised by the appellants. All these contentions are disposed of by the appellate authority by observing :

> "I have gone through the appeal memo, the records produced before me. the Joint Director has given sufficient reasons in para 5 of his order which the action of supersession is necessary. It is not necessary for me again to reproduce all thee facts. I totally agree with him. I therefore, pass the following order."

9. Borrowing the words and using the phraseology of the Division Bench namely that the Appellate authority is not a "Rubber Stamp" but it is obliged to independently scrutinise the legality and validity of orders challenged and impugned before it, I find that the above observations apply squarely to the facts and circumstances of the present case.

10. In the present case, the Appellate Authority has treated the matter rather casually and taken the entire proceedings lightly without in any manner being aware of the responsibility and obligations caste by law. Once the order was set aside by this court, it was not open for the Appellate Authority to have relied upon the observations which are reproduced above.

11. Shri Borkar appearing for the contesting respondents and Shri Palekar - learned AGP could not dispute that the earlier order and observations therein on merits, have been reproduced in the present order as well. There is no independent scrutiny of the materials including the pleas raised by the respondents, that the petitioners have alternate accommodation which is convenient to them and which in fact has been handed over to third parties. Such is the seriousness of the matter. When the petitioners are apprehending that they would loose possession and equally the respondents are accusing them of adopting delaying tactics, it was incumbent on the Appellate authority to have independently applied its mind. It is unfortunate that the contesting respondents have to suffer because a serious lacuna on the part of the Appellate authority. "

3. This court was disturbed by the adamancy

exhibited by the authority and therefore directed that the Divisional Commissioner, Pune having prejudged the issues, the matter must be taken out of his purview and placed before some other Divisional Commissioner. By consent, the matter was placed before the Divisional Commissioner, Mumbai. The Divisional Commissioner, Mumbai was directed to dispose off the Appeals on merits and in accordance with law afresh within the time stipulated by this court.

4. In the order impugned in the present Writ Petitions the Divisional Commissioner, Mumbai has made identical observations as would be evident from the following :-

> ". In the above situation the issue to be considered is whether the appellant is to be provided alternate accommodation considering Section 21 of the Slum Act or whether considering the decree of 1968 the appellant deserves to be evicted.
>
> Section 22 reads as under :
>
> > "Proceedings for eviction of occupiers or for issue of distress warrants not to be taken without permission of competent authority :-
> >
> > (4) In granting or refusing to grant the permission (under clause (a)

> or (b) of sub-section (1) (or clause (a) of sub-sectin (1-A) the Competent Authority shall take into account the following factors, namely:-
>
> (a) whether alternative accommodation within the means of the occupier would be available to him, if he were evicted,"
>
> This case has gone through a series of litigations and has been examined on merits many a times over. The main arguments before me was on the point of providing alternate accommodation to the occupier and how binding it is. It is necessary to mention here that eviction decree is of the year 1968 and it is not challenged by the appellant and therefore, they cannot ask for alternate accommodation now, it cannot be justified."

5. To say the least, this shortcut being adopted has resulted in this court's time being consumed again by the same litigant, in the third round of litigation. The Divisional Commissioner was obliged to advert to Section 22 of the Act and consider all aspects of the controversy as projected before the Divisional Commissioner. However, that has not been done. Mr.Patil, has submitted that the Divisional Commissioner is guilty of contempt of this Court's order and Directions. Hence, action under the Contempt of Courts Act, 1971 be initiated. However, I am not inclined to initiate any such action at this stage

although the orders of this court are disregarded repeatedly. The Appellate Authority may invite such action unless it is careful and diligent.

6. The Learned AGP found it difficult to support the order of the Divisional Commissioner and now makes a statement before me that the matter will be heard afresh. Even the decree holder found it difficult to support the order in his favour.

7. These are disturbing state of affairs to say the least. Apart from exhibiting obstinacy and adamancy, this litigation reflects that the officers concerned do not have any respect for the orders of the court. It also appears that they do not bother to go through them. They are unaware of the directions contained in them. Apart from non-application of mind, Repeating the observations in earlier orders which are quashed and set aside, shows callousness and a casual attitude on their part. I therefore cannot overlook this conduct, which not only inconveniences the litigants but results in judicial time being wasted.

8. These are not officers who are unaware of matters of this nature. The Divisional Commissioners are high ranking officers drawn from the Indian Administrative Service. They are In-charge of Revenue Division and are empowered to decide Appeals against the order of competent authority. The Indian Administrative Service, is a service known to be efficient and hardworking. In the present case expectation from the Divisional Commissioner was not too much. The Commissioner should have, following the orders and directions of the court, gone into the controversy afresh and passed appropriate orders on merits and in accordance with law. This expectation was not too much. In **AIR 1997 S.C. 1390 State of Bihar and Ors. vs. Subhash Singh** the Hon'ble Supreme Court had this to observe :

> "3. The Constitution of India is the supreme law of the land, having flown from "We, the people of India, i.e. Bharat having solemnly resolved to constitute India into a sovereign, socialist, secular democratic Republic. The sovereign power is distributed among the Legislature, the Executive and the Judiciary with checks and balances but not in water-tight rigid mould. In our democracy

governed by the rule of law, the Judiciary has expressly been entrusted with the power of judicial reviews as sentinal in qui vie. Basically judicial review of administrative actions as also of legislation is exercised against the action of the state. Since the state or public authorities act in exercise of their executive or legislative power, they are amenable tot he judicial review. The state, therefore, is subject to etat de droit, i.e. the State is submitted to the law which implies that all actions of the State or its authorities and officials must be carried out subject to the Constitution and within the limits set by the law, i.e., constitution alism. In other words, the State is to obey the law. The more the administrative action in our welfare State expands widely touching the individuals, the more is the scope of judicial review of State action, Judicial review of administrative action is, therefore, an essential part of rule of law. The judicial control on administrative action, thus, affords the Courts to determine not only the constitutionality of the law but also the procedural part of administrative action as a part of judicial review. The Constitution has devised permanent bureaucracy as part of the political executive. By operation of Art.53 read with Arts. 73 and 74 as well as Art.154 read with Arts.163 and 166, the business of the State is carried on in accordance with the rules of business issued by the President/the Governor, as the case may be, or the rules made for the subordinate officers in that behalf. The normal principle that the permanent bureaucracy is accountable to the political executive is subject to judicial review. The doctrine of "full faith and credit" applied to the acts done by the officers and presumptive evidence of regularity of official acts done or performed, is apposite in faithful discharge of duties to elongate public purpose and to be in accordance with the procedure prescribed. It is now settled legal position that the

bureaucracy is also accountable for the acts done in accordance with the rules when judicial review is called to be exercised by the courts. The hierarchical responsible for the decision is their in-built discipline. But the head of the Department/designated officer is ultimately responsible and accountable to the court for the result of the action done or decision taken. Despite this, if the is any special circumstance absolving him of the accountability or if someone else is responsible for the action, he needs to bring them to the notice of the court so that appropriate procedure is adopted and action taken. The controlling officer holds each of them responsible at the pain of disciplinary action. The object thereby is to ensure compliance of the rule of law.

4. The constitutional courts exercise their power of judicial review with constraint to ensure that the authorities on whom the power is entrusted under the rule of law or confided, is discharged truly, objectively, expeditiously for the purpose for which substantive acts/results are intended. The petitioner being a member of the permanent executive, is enjoined to comply with the orders of the court passed in exercise of the judicial review. On an earlier occasion, while disposing of he writ petition, the High court had directed the respondent to consider the case of the writ petitioner and to dispose it of with reasoned order within two months. Obviously, the High court expected that the authorities would discharge their duties expeditiously as enjoined under the rules and as per the directions. Since they did not discharge they duty, necessarily, they were required to give explanation to the court as the circumstances in which they could not comply with the direction issued by the court or if there was any unavoidable delay, they should have sought further time for compliance. Unfortunately, neither of the

steps have been taken by the officer in that regard. Therefore, the High Court was constrained to impose the costs personally against him for non-compliance of the order."

9. In another decision, **Tarlochan Dev Sharma v. State of Punjab reported in AIR 2001 S.C. 2424 the** Hon'ble Supreme Court observes, insofar role of bureaucracy, as under :

"14. It is interesting to view the present day bureaucrat political relationship scenario. "A bureaucratic apparatus is a means of attaining the goals prescribed by the political leaders at the top. Like Alladin's lamp it serves the interest of whatsoever wields it. Those at the helm of affairs exercise apical dominance by dint of their political legitimacy.....The Ministers make strategic decisions. The officers provide trucks, petrol and drivers. They give march orders. The Minister tells them where to go. The officers have to act upon instructions from above without creating a fuss abut it. (Effectiveness of Bureaucracy, the Indian Journal of Public Administration, April-June, 2000 at p.165)

15. In the system of Indian Democratic Governance as contemplated by the Constitution senior officers occupying key positions such as Secretaries are not supposed to mortgage there own discretion, volition and decision making authority and be prepared to give away or being pushed back or pressed ahead at the behest of politicians for carrying out commands having no sanctity in law. The Conduct Rules of Central Government Services

command the civil servants to maintain at all times absolute integrity and devotion to duty and do nothing which is unbecoming of a Government servant. No Government servant shall in the performance of his official duties, or in the exercise of power conferred on him, act otherwise than in his best judgment except when he is acting under the direction of his official superior. In Anirudhsinhji Jadega (1995) 5 SCC 302 : (1995 AIR SCW 3543 : AIR 1995 SC 2390), this Court has held that a statutory authority vested with jurisdiction must exercise it according to its own discretion' discretion exercised under the direction or instruction of some higher authority is failure to exercise discretion altogether. Observations of this court in the Purtabpur Company Ltd., AIR 1970 SC 1896, are instructive and apposite. Executive officers may in exercise of their statutory discretions take into account considerations of public policy and in some context policy of Minister or the Government as a whole when it is a relevant factor in weighing the policy but they are not absolved from their duty to exercise their personal judgment in individual cases unless explicit statutory provision has been made for instructions by a superior to bind them. As already stated we are not recording for want of adequate material, any positive finding that the impugned order was passed at the behest of or dictated by someone else than its author. Yet we have no hesitation in holding that the impugned order betrays utter non-application of mind to the facts of the case and the relevant law. The manner in which the power under S.22 has been exercised by the competent authority is suggestive of betrayal of the confidence which the State Government reposed in the Principal Secretary in conferring upon him the exercise of drastic power like removal of President of a Municipality under S.22 of the Act. To say the least what has been done is not what is expected to be done by a senior official like

> the Principal Secretary of a wing of the State Government. We leave at that and say no more on this issue. "

9. Thus, repeatedly flouting the orders and directions of this court necessiating remand of matters to authorities cannot be overlooked. Such acts are now required to be dealt with sternly so that they are not repeated. The Administrative Heads ought to be aware of their responsibilities to people. In such circumstances, while making the Rule absolute and setting aside and quashing the impugned orders, I impose costs quantified at Rs.25,000/-. The cost to be paid by the State Government to the petitioner and the Decree Holder (Respondent no.1 & 2 A) in equal proportions. Cost may be recovered from the concerned Divisional commissioner personally. In the light of the statement made by Ms.Cardozo, the matter will now be heard by the Divisional Commissioner afresh and parties to appear before him on 10.12.2007. The Divisional Commissioner to then decide the matter uninfluenced by the observations in the orders which have been set aside by this court and strictly in accordance with law as expeditiously as possible and

within a period of six weeks from the date of appearance of parties.

10. A copy of this order be forwarded to the Chief Secretary of the State of Maharashtra for information and necessary action.

****